IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. FLOYD BROWN and KRISTINE PUCHTA-BROWN

Direct Appeal from the Circuit Court for Franklin County
Nos. 16975, 17454 Thomas W. Graham, Judge

No. M2007-02573-CCA-R3-CD - Filed June 24, 2009

Defendants, Floyd Brown and Kristine Puchta-Brown, each entered a plea of guilty in case no. 16975 to theft of services valued between $10,000 and $60,000, a Class C felony. In case no. 17454, each Defendant entered a plea of guilty to identity theft, a Class D felony. Pursuant to the terms of a negotiated plea agreement, the trial court sentenced each Defendant as a Range I, standard offender, to consecutive sentences of three years for their Class C felony convictions and two years for their Class D felony convictions. The trial court held a sentencing hearing to determine the manner of service of the sentences and Defendants' requests for judicial diversion or, in the alternative, full probation. At the conclusion of the sentencing hearing, the trial court denied Defendants' requests for judicial diversion and full probation. The trial court ordered Defendant Brown and Defendant Puchta-Brown to serve fifty-four days in confinement for their Class C felony convictions, after which the sentences were suspended and each Defendant placed on probation. The trial court ordered Defendant Brown and Defendant Puchta-Brown to serve thirty-six days in confinement for their Class D felony conviction, after which the sentences were suspended and each Defendant placed on probation. On appeal, Defendants argue that the trial court erred in denying their requests for judicial diversion and their requests that they be allowed to serve their sentences on probation. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Floyd Brown and Kristine Puchta-Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

The transcript of the guilty plea submission hearing is not included in the record. See State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999) (observing that "a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed"). Therefore, the facts surrounding Defendants' convictions may only be gleaned from the presentence reports and the testimony presented at the sentencing hearing.

The official version of the facts contained in the presentence report provides as follows:

> Between April 1, 2002, and January 1, 2006, Dr. William Brown and his wife, Dr. [Kristine] Brown, conspired together to obtain TennCare Insurance coverage for Floyd Brown. Floyd Brown then received medical treatment that TennCare Insurance was billed for. The Browns then received payments from TennCare for the medical treatment of Floyd Brown. In July of 2006, the Defendants opened a business account at Citizens Community Bank in the name of Freeman Huntley, a former patient. The Browns provided documents with the victim's forged signature to open this account. When the bank contacted Mr. Huntley, it was discovered [that] the Browns did not have power of attorney and the documents provided by them were forgeries.

According to the presentence report, Defendants had been married for thirty-one years and have three adult children. Neither Defendant has a prior criminal record. Both Defendants reported that "they are in a very poor financial state." Defendants listed numerous outstanding credit card balances and loan obligations in the presentence report. According to the presentence report, Defendant Brown has an IRA Rollover Account with the current value of $449,052.45, and Defendant Puchta-Brown reported that she had a whole life insurance policy in the amount of $500,000 which has been paid in full.

Defendant Brown graduated from college in 1979 with a medical degree in the field of osteopathic medicine. Defendant Brown stated in the presentence report that he was in private practice from January 1, 2000, until April 1, 2002, when he joined the Doctor's Group in Manchester. Defendant Brown returned to private practice on August 1, 2004, and retired on November 30, 2005. Pursuant to an agreed order, Defendant Brown was placed on probation by the Tennessee Board of Osteopathic Examination on September 26, 2001, for a period of three years. On November 9, 2005, Defendant Brown's medical license was suspended for a period of one year, followed by a probationary period of five years if his license was reinstated at the end of the one-year suspension period.

Defendant Brown described his physical health as "fair." Defendant Brown stated in the presentence report that he suffers from diabetes, high blood pressure, allergies, gout, chronic cardiac

tachycardia, angina, chronic bronchitis, chronic back pain, congestive heart failure, pedal edema, kidney stones, renal failure, and has had one stroke. Defendant Brown also described his mental health as "fair," and stated that he is currently receiving mental health care for bipolar disorder, anxiety attacks, panic attacks, memory problems and post-stroke syndrome. Defendant Brown stated that he is not currently taking any medications which had previously been prescribed for these mental health problems.

Defendant Brown said in his "version of the offense" in the presentence report that "after [a] heart attack I was unable to work or get health insurance." Defendant Brown also stated that he "was a tax dependent of [his] son, Aaron Brown." As for the identity theft offense, Defendant Brown stated in his presentence report that the business account in Mr. Huntley's name was for the "group practice." Defendant pointed out that the State only looked at the gross income reflected in the account. Defendant said that after payment of business expenses, the account was either overdrawn or only had a balance of approximately $100.00.

Defendant Puchta-Brown graduated from college in 1979 also with a medical degree in the field of osteopathic medicine. Defendant Puchta-Brown's medical license was administratively revoked in Tennessee on December 31, 1987. Defendant Puchta-Brown stated in the presentence report that she was employed as an ultrasound technician by the Doctor's Group in Manchester from April 1, 2002, until August 1, 2004, when she joined the Doctor's Group in Winchester.

Defendant Puchta-Brown reported that she is in "fair" physical health and stated in the presentence report that she suffers from migraine headaches as the result of a concussion in 1989, a collapsed knee, osteoarthritis in both knees, fibroid uterus, hypertension and retinal fibroplasia in both eyes. Defendant Puchta-Brown stated that she has "excellent" mental health.

Defendant Puchta-Brown explained in her presentence report that she and Defendant Brown initially applied for TennCare insurance benefits because they "qualif[ied] for it and could not get regular insurance." Defendant Puchta-Brown acknowledged that she was aware that the TennCare program at one time offered insurance to those with pre-existing conditions in exchange for the payment of a premium. Defendant Puchta-Brown stated, "I have no recollection as to when our times changed from being able to pay or not." As for the identity theft offense, Defendant Puchta-Brown stated that she thought the papers were "ok" and that she trusted "a previous business partner." Defendant Puchta-Brown stated, "we (or at least I did) pleaded guilty to prevent a [trial] because they threatened our son, Aaron" with prosecution.

Anthony James DeMatteo testified at the sentencing hearing that he is the mayor of Estill Springs and has known Defendant Brown and Defendant Puchta-Brown for more than ten years. Mr. DeMatteo stated that each Defendant had displayed honesty and respect during their relationship. Mr. DeMatteo said that Defendant Brown had a general reputation in the community as a "good doctor," and showed "care and concern" for his patients, which included Mr. DeMatteo's wife and son.

On cross-examination, Mr. DeMatteo said that he was not aware that Defendant Brown's medical license had been suspended or that Defendant Puchta-Brown's medical license had been administratively revoked, but he stated that these factors did not change his favorable opinion of either Defendant. Mr. DeMatteo said that he was not aware that Defendant Brown had applied for TennCare medical benefits or that Defendants had a retirement fund in the amount of $400,000 and income in the amount of $200,000. Mr. DeMatteo again stated that this information did not alter his opinion of Defendants.

Defendant Brown made a statement on his own behalf at the sentencing hearing. Defendant Brown outlined his employment history which included work in a level three trauma center, a pain management center, numerous emergency rooms, and the Methodist Health Care Center for Senior Citizens. Defendant Brown stated that he was employed for approximately one year at a drug and alcohol rehabilitation center and was a clinical instructor at the University of Health Sciences Center from 1980 to 1987. Dr. Brown said that he had never been sued for malpractice despite working in certain areas prone to such suits. Dr. Brown acknowledged that he had suffered mental health problems in the past, that he sought help with these problems, and that he had completed his psychiatric care. Defendant admitted that he committed the charged offenses. He stated:

> I exercised terrible judgment and looking back, I can't imagine what I was thinking. Obviously, I would not have committed a second crime while I was awaiting trial for the first one. I did not realize at the time that I did [the second offense] that it was a crime. The information was provided to me by my partner, and I was told, based upon a notary, that it was okay, and I did not harm Mr. Huntley. In fact, he would have benefitted from allowing as a group to use his business account to comply with Medicare regulations in the State of Tennessee. There was going to be no stealing or anything else from him, and as proof of that, there are records that I actually deposited money into that account. He had none of his own money in that account.

Defendant Brown acknowledged that he received "hundreds of thousands of dollars" from his private practice, but said that this amount did not reflect his business expenses. Defendant Brown said that Defendant Puchta-Brown "just signed the papers," and "[s]he had nothing to do with the formulation of any of this." Defendant Brown assured the Court that the offenses would not happen again.

Defendant Puchta-Brown also made a statement on her own behalf at the sentencing hearing. Defendant Puchta-Brown said that she received a bachelor's degree in biology from the University of Missouri and then graduated from medical school. Defendant Puchta-Brown stated that she made "one of the highest scores [on] the licensing exam for the State of Tennessee." While in Missouri, Defendant Puchta-Brown was a clinical instructor at the University of Health Sciences Center and practiced primarily in the field of obstetrics and gynecology. Defendant Puchta-Brown stated that she was elected chief-of-staff of a level three trauma center in Missouri.

Defendant Puchta-Brown stated that she encountered a problem when she tried to renew her license after the family moved to Tennessee. She stated, "I'm still not really sure what happened, but there was a big to-do and because of finances, we didn't fight it, and I decided to retire instead of fight them, so I could spend some time with my children." Defendant Puchta-Brown said that in 2002 she joined an ultrasound medical company as a technician and manager. In connection with the charged offense of identity theft, Defendant Puchta-Brown stated that:

> we thought the signatures that were provided on the paperwork [were] provided legally as provided by our previous business partner. Realize [sic] we probably shouldn't have trusted him at the time, but we did. The fact that we trusted somebody we shouldn't is on our, you know, that's our responsibility, because we trust him, even though the papers were notarized by a legal notary.

In conclusion, Defendant Puchta-Brown stated:

> Part of what has been going on that has bothered me the most has been that the prosecution pulled in one of our sons, because for awhile he had to support us after my husband had a heart attack, and because he's in the military we depended for a short period of time on him, and they threatened his livelihood because he has a high security clearance in the military, and they basically said that they were going to throw the book at him if we didn't say we were guilty basically, so I just wanted to say that. I felt that was a problem for me, but that's all.

In considering Defendant Brown's request for judicial diversion, the trial court found that the information provided by Defendant Brown concerning his social and employment history, home environment, marital stability, and family responsibility was so sparse as to render these factors neutral. As to Defendant Brown's general reputation and amenability to correction, the trial court found that:

> the Defendant introduced some proof of positive regard from some friends and patients; however, little proof was put on to establish his community wide reputation. As to his amenability to correction, his less than fully apologetic attitude does not support this as a favorable factor and overall, the Court finds the sparseness of proof on this issue to cause the same to be at best neutral to diversion.

In favor of the grant of judicial diversion, the trial court considered Defendant Brown's lack of criminal history. However, weighing against diversion were Defendant Brown's mental and physical condition and his emotional stability. The trial court found that Defendant Brown's attitude "as gleaned from the presentence report and his sentenc[ing] statement [did] not establish a full appreciation of the wrongfulness of his conduct," and found that the "proof on balance" did not cause the trial court to consider this factor favorably. Also weighing against diversion was Defendant Brown's behavior since his arrest on charges of theft of services. The trial court found that the "proof in this case is that after Defendant [Brown] was charged with TennCare fraud in

March of 2006 which resulted in a guilty plea in this case, he did nevertheless in July of 2006 open up what appears to be a fictitious business account which resulted in his conviction for identity fraud."

Weighing heavily against diversion were the circumstances of the offenses and the deterrent effect of punishment upon future criminal conduct. The trial court found:

> the crimes reflected by the Defendant's many fraudulent claims on TennCare which occurred over a multi-year period and which were made by a professional in the area of medical care causes this conviction to be significant. The second conviction which involved apparently trying to avoid taxes or other government scrutiny also occurred on more than one occasion as the account was used falsely on many occasions. The circumstances of these two crimes being multiple and not isolated events cause this factor to weigh heavily against diversion. . . . The very nature of these white collar crimes which involved multiple transgressions and significant illegally obtained benefits requires the detrimental affect of punishment, not diversion. This factor weighs heavily against diversion.

The trial court found that "Defendant's conduct over a continued period of years, the significance of the amounts of money obtained, and [the] Court's finding that the Defendant has not fully accepted the wrongfulness of his conduct" weighed heavily against finding that diversion would serve the ends of justice and the best interests of the public and Defendant Brown. After considering the appropriate factors, the trial court found that the negative factors far outweighed any favorable or neutral factors and denied Defendant Brown's request for judicial diversion.

In considering Defendant Puchta-Brown's request for judicial diversion, the trial court found Defendant Puchta-Brown's lack of a criminal history to weigh favorably toward the grant of diversion. The trial court also found that Defendant Puchta-Brown's mental and physical condition was "slightly favorable for diversion." Because of the minimal proof presented, the trial court found that Defendant Puchta-Brown's social history, emotional stability, past employment, home environment, and family responsibility did not weigh for or against diversion. The trial court found that although Defendant Puchta-Brown was taking many drugs, all appeared to be legally prescribed, and thus Defendant's drug usage was a neutral factor. The trial court found that Defendant Puchta-Brown appeared to have a stable marriage, but found that Defendant Puchta-Browns's "husband as a co-defendant in these cases involving thousands of dollars cannot be said to be a positive factor," and accorded this factor little weight. In considering Defendant Puchta-Brown's general reputation and amenability to correction, the trial court found that:

> the Defendant introduced little proof of reputation. On the issue of amenability to correction, her less than fully apologetic attitude does not support this as a favorable factor. The Court finds the sparseness of proof when combined with her lack of remorse causes this factor at best to be neutral to diversion.

The trial court found that Defendant Puchta-Brown's behavior since her arrest on the first charges of theft of services as reflected in the opening of a fictitious business account in July 2006, weighed unfavorably against diversion. The trial court found that several factors weighed heavily against the grant of diversion. The trial court found that Defendant Puchta-Brown's presentence report "clearly establish[ed] both a lack of proper appreciation of the wrongfulness of her conduct and a resentment of the State's prosecution." Also viewed as significant negative factors were the circumstances of the two offenses involving multiple events and the need for punishment as a deterrent against future criminal activity. The trial court found that diversion would not serve the ends of justice and were not in the best interest of either the public or Defendant Puchta-Brown based on "Defendant's conduct over a continued period of years, the significance of the amounts of money obtained, and [the] Court's finding that the Defendant has not fully accepted the wrongfulness of her conduct."

After considering the appropriate factors, the trial court found that the negative factors far outweighed any favorable or neutral factors and denied Defendant Puchta-Brown's request for judicial diversion.

The trial court also denied both Defendants' request for full probation. The trial court found that both Defendants' lack of remorse for their offenses, their equal culpability, and the deterrent effect "necessary to cause many others who might be tempted to make fraudulent TennCare claims or to hide income under [a] false identity" supported the imposition of a period of confinement followed by probation.

II. Judicial Diversion

Defendants argue that the trial court erred in denying their requests for judicial diversion. Both Defendants contend that those factors considered neutral by the trial court should have been considered favorable to diversion instead. Defendants submit that "[f]rom a judicial diversion standpoint there is nothing exceptional in the circumstances of these cases."

A defendant is eligible for judicial diversion if he or she is convicted of a Class C, D, or E felony or lesser crime and has not previously been convicted of a felony or a Class A misdemeanor. See T.C.A. § 40-35-313(a)(1)(B)(I). Judicial diversion allows the trial court to defer further proceedings without entering a judgment of guilt and to place the defendant on probation under reasonable conditions. Id. § 40-35-313(a)(1)(A). If the defendant completes his or her probation successfully, the trial court will dismiss the proceedings against the defendant with no adjudication of guilt. See id. § 40-35-313(a)(2). The defendant may then apply to have all records of the proceedings expunged from the official records. See id. § 40-35-313(b). A person granted judicial diversion is not convicted of an offense because a judgment of guilt is never entered. See id. § 40-35-313(a)(1)(A).

When a defendant challenges the manner of serving a sentence, this court conducts a de novo review of the record with a presumption that "the determinations made by the court from which the

appeal is taken are correct." T.C.A. § 40-35-401(d). However, when the defendant challenges the trial court's denial of a request for judicial diversion, a different standard of appellate review applies. Because the decision to grant judicial diversion lies within the sound discretion of the trial court, this Court will not disturb that decision on appeal absent an abuse of discretion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). Upon review, we will give the trial court the benefit of its discretion if "'any substantial evidence to support the refusal' exists in the record." State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992) (quoting State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983)).

In determining whether to grant judicial diversion, the trial court must consider (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. Electroplating, Inc., 990 S.W.2d at 229; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). In addition, "the record must reflect that the court has weighed all of the factors in reaching its determination." Electroplating, Inc., 990 S.W.2d at 229. If the trial court refused to grant judicial diversion, it should state in the record "the specific reasons for its determinations." Parker, 932 S.W.2d at 958-59.

The record reflects that the trial court engaged in a methodical review of each of the required factors and found that diversion was not appropriate in these cases. The record contains substantial evidence to support the trial court's determination. Accordingly, we conclude that the trial court did not abuse its discretion in denying judicial diversion. Defendants are not entitled to relief on this issue.

III. Full Probation

Defendants argue that the trial court erred in not allowing them to serve the entire term of their sentences on probation. Defendants argue that the trial court failed to give sufficient consideration to their poor health, their lack of a criminal record, and their good reputation in the community in determining that Defendants were not suitable for full probation. Defendants submit that there is nothing in the record to suggest how incarceration would have a deterrent effect on others in the community. Defendants contend that the loss of their medical licenses and professions provides sufficient deterrence both for them individually and for others.

We observe initially that Defendants' crimes in case no. 16975, occurring from April 1, 2002, to January 1, 2006, span the 2005 amendments to the Sentencing Act which are effective for criminal offenses committed on or after June 7, 2005. See 2005 Tenn. Pub. Acts, ch. 353, § 18 (providing that offenses committed prior to June 7, 2005, shall be governed by prior law unless the defendant executes a waiver of his or her ex post factor protections, which was not done in the case sub judice). As relevant to Defendants, the 2005 amendments removed the statutory presumption that an eligible defendant is a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102 (5), (6). (Under the Sentencing Act as amended, a trial court is directed that it should consider probation as

a sentencing alternative for statutorily eligible defendants.) See T.C.A. § 40-35-303(b) (emphasis added). Nonetheless, the 2005 amendments to the Sentencing Act did not alter the requirement that a defendant bears the burden of establishing his or her suitability for full probation, the issue in the case presented here, even if the defendant should be considered a favorable candidate for alternative sentencing. Id. § 40-35-303(b); State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Therefore, for purposes of this opinion, we have cited to the revised version of the Sentencing Act. See State v. Jennifer Lynn Stinnett, No. M2007-01802-CCA-R3-CD, 2008 WL 2648930, at *7 n3 (Tenn. Crim. App., at Nashville, July 2, 2008), perm. to appeal denied (Tenn. Dec. 29, 2008) (noting that it was unnecessary to discuss the 2005 amendments to the Sentencing Act at length "because our resolution of the issue – the denial of full probation – would be the same under the law both before and after the 2005 revisions").

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correctness, however, "'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)).

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6). No longer is any defendant entitled to a presumption that he or she is a favorable candidate for probation. Carter, 254 S.W.3d at 347. The following considerations provide guidance regarding what constitutes "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant....

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence.

Because Defendants were convicted of Class C and Class D felonies, they are considered as favorable candidates for alternative sentencing. See id. § 40-35-102(6). We note, however, that "the determination of whether the [defendant] is entitled to an alternative sentence and whether the [defendant] is entitled to full probation are different inquiries." Boggs, 932 S.W.2d at 477. The defendant has the burden of establishing his or her suitability for full probation, even if the defendant should be considered a favorable candidate for alternative sentencing. T.C.A. § 40-35-303(b); Boggs, 932 S.W.2d at 477. In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

Defendants argue that the trial court did not make any findings or offer any explanation as to why Defendants' request for probation should be denied on the basis of deterrence. Our supreme court has held "that a sentencing judge may impose confinement based solely on deterrence when the evidence 'would enable a reasonable person to conclude that (1) deterrence is needed in the community, jurisdiction, or state; and (2) the defendant's incarceration may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.'" State v. Trotter, 201 S.W.3d 651, 656 (Tenn. 2006) (quoting State v. Hooper, 29 S.W.3d 1, 13 (Tenn. 2000)). In addition, the Hooper court set forth the criteria a trial court must consider when deterrence is the sole basis for denying alternative sentencing. Hooper, 29 S.W.3d at 10-12 (emphasis added). These considerations include: (1) whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or the state as a whole; (2) whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior; (3) whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case; (4) whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective; and (5) whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions. Id. at 10-12.

Nonetheless, a need for deterrence was not the only basis for the trial court's denial of full probation. The trial court found that both Defendants lacked remorse as reflected in their refusal to accept culpability for their conduct and the fact that they opened a fraudulent bank account to receive income earned by Defendant Brown's medical practice after they were charged with the theft of services from the TennCare insurance program. Defendants acknowledged at the sentencing hearing that they were employed for much of the time that they were receiving TennCare insurance benefits. Defendant Puchta-Brown stated at the sentencing hearing that she agreed to enter a plea of guilty to the charge of theft of services because the investigating officers threatened to charge her son with the offense. Both Defendants acknowledged that after their arrest for theft of services, they opened a business account under Mr. Huntley's name. Both Defendants, however, blamed this conduct on the advice of an unnamed business advisor, and Defendant Brown maintained that Mr. Huntley was never hurt by his conduct.

The failure to acknowledge culpability may reflect on a defendant's potential for rehabilitation and support a finding that a period of confinement is necessary to avoid depreciating the seriousness of an offense. State v. Gutierrez, 5 S.W.3d 641, 647 (Tenn. 1999); State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). Further, a lack of remorse can also be utilized by a trial court during the consideration of probation. State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994).

Based on the foregoing and our review of the facts and circumstances of this case, we conclude that Defendants have not carried their burden of establishing their suitability for full probation and have not established that full probation "serves the ends of justice or the best interest of the public." Carter, 254 S.W.3d at 348. There is evidence in the record to support the trial court's denial of full probation. Defendants are not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE